



## MEMORANDUM

TO: Wood Miller, Chair  
Uniformity Committee  
Michael Fatale, Moderator  
Section 17 Regulations Working Group  
Multistate Tax Commission

FROM: Bruce Fort  
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DATE: August 31, 2015

SUBJECT: Proposed Language for Determining Default Rule for Related-Party  
Transactions Involving Services

On July 28, 2015 our Section 17 Model Regulations Working Group held a special meeting devoted to studying the current proposed model regulation draft to see whether the model regulations adequately served states using separate-entity reporting systems. Michael Fatale facilitated the well-attended meeting. Our “subgroup” will continue to meet on a weekly basis on Friday afternoon at 3:30 p.m. EST (but note Mr. Fatale will be unable to attend the next meeting). The subgroup discussed the need to coordinate the Section 17 and Section 1 working group efforts to ensure a unified set of regulations, discussed the potential for incongruous sourcing results for particular industries or entities in separate-entity states and whether the subgroup should also consider equitable apportionment issues.

Additionally, the subgroup had a discussion about proposed language dealing with professional services sold to a related party. That language was not available to the group as a whole or the public at that time, but is set forth below. The group also discussed whether similar language should be considered for other areas in the proposed draft, including (1) services delivered by electronic means; and (2) licensing of intangible property among related parties. The proposed modifications to our draft regarding professional services are highlighted below. It is expected that this language will be discussed at our next meeting on September 4, 2015.

a. Professional Services.

i. In General.

Except as otherwise provided in 4.d.ii, professional services are services that require specialized knowledge and in some cases require a professional certification, license or degree. Professional services include, without limitation, management services, bank and financial services, financial custodial services, investment and brokerage services, fiduciary services, tax preparation, payroll and accounting services, lending and credit card services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services.

ii. Overlap with Other Categories of Services.

(A) Certain services that fall within the definition of “professional services” set forth in 4.d.i are nevertheless treated as “in-person services” within the meaning of 4.b, and are assigned under the rules of 4.b. Specifically, professional services that are physically provided in person by the taxpayer such as carpentry, certain medical and dental services or child care services, where the customer or the customer’s real or tangible property upon which the services are provided is in the same location as the service provider at the time the services are performed, are “in-person services” and are assigned as such, notwithstanding that they may also be considered to be “professional services”. However, professional services where the service is of an intellectual or intangible nature, such as legal, accounting, financial and consulting services, are assigned as professional services under the rules of section 4.d.iii, notwithstanding the fact that such services may involve some amount of in-person contact.

(B) Professional services may in some cases include the transmission of one or more documents or other communications by mail or by electronic means. However, in such cases, despite this transmission, the assignment rules that apply are those set forth in this section, 4.d.iii, and not those set forth in 4.c, pertaining to services delivered to a customer or through or on behalf of a customer.

iii. Assignment of Sales.

In the case of a professional service, it is generally possible to characterize the location of delivery in multiple ways by emphasizing different elements of the service provided, no one of which will consistently represent the market for the services. Therefore, for purposes of consistent application of the market sourcing rule stated in [UDITPA], the Commissioner has concluded that the location of delivery in the case of professional services is not susceptible to a general rule of determination, and must be reasonably approximated. The assignment of a sale of a professional service depends in many cases upon whether the customer is an individual or business customer. In any instance in which the taxpayer, acting in good faith, cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. For purposes of assigning the sale of a professional service, a taxpayer’s customer is the person who contracts for such service, irrespective of whether another person pays for or also benefits from the taxpayer’s services. Except as provided in 4.d.iiii(D) (mutual fund sales), in any instance in which the taxpayer is

not taxable in the state to which a sale shall be assigned, the sale shall be excluded from the numerator and denominator of the taxpayer's sales factor. See 1.f.ii

(A) General Rule. Sales of professional services other than those services described in 4.d.iii(B) (architectural and engineering services), 4.d.iii(C) (services provided by a financial institution), ~~and 4.d.iii(D) (certain litigation-related legal services )~~ and 4.d.iii(E)(inter-company services), are assigned in accordance with this section 4.d.iii(A).

#### 1. Professional Services Delivered to Individual Customers.

Except as otherwise provided in this section, 4.d, in any instance in which the service provided is a professional service and the taxpayer's customer is an individual customer, the state or states in which the service is delivered shall be reasonably approximated as set forth in this section, 4.d.iii(A)1. In particular, the taxpayer shall assign the sale to the customer's state of primary residence, or, if the taxpayer cannot reasonably identify the customer's state of primary residence, to the state of the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its sales of services from an individual customer, the taxpayer is required to identify the customer's state of primary residence and must assign the receipts from the service or services provided to that customer to that state.

Comment [A6]: The work group has questioned whether or not to keep this re-articulation of the throwout rule.

#### 2. Professional Services Delivered to Unrelated Business Customers.

Except as otherwise provided in this section, 4.d, in any instance in which the service provided is a professional service and the taxpayer's customer is a business customer, the state or states in which the service is delivered shall be reasonably approximated as set forth in this section, 4.d.iii(A)2. In particular, unless the taxpayer may use the safe harbor set forth at 4.d.iii(A)4, the taxpayer shall assign the sale as follows: first, by assigning the receipts to the state where the contract of sale is principally managed by the customer; second, if such place of customer management is not reasonably determinable, to the customer's place of order; and third, if such customer place of order is not reasonably determinable, to the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its sales of services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

#### 3. Professional Services Delivered to Related Party Business Customers.

Except as otherwise provided in this section, 4.d, in any instance in which the service provided is a professional service and the taxpayer's customer is a business customer ~~that, with the taxpayer is engaged in a unitary business with the taxpayer [and part of the taxpayer's unitary business]~~, the state or states in which the service is delivered shall be reasonably approximated as set forth in this section, 4.d.iii(A)3. In particular, unless the taxpayer may use the safe harbor set forth at 4.d.iii(A)4, the taxpayer shall assign the receipts to the state or states where the customer

conducts such unitary [its] business. When the customer conducts the unitary business in more than one state the taxpayer shall assign receipts from the customer based on the customer's payroll factor in each state where it conducts such business. If the customer's payroll factor does not reasonably approximate the state or states where the service is delivered, the taxpayer may use another method to reasonably approximate the state or states where its customer conducts such business.

#### 4. Safe Harbor; Large Volume of Transactions.

Notwithstanding the rules set forth in 4.d.iii(A)1 and 2, a taxpayer may assign its sales to a particular customer based on the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether individual or business, and (2) does not derive more than 5% of its sales of services from such customer. This safe harbor applies only for purposes of 4.d.iii(A), and not otherwise.

(B) Architectural and Engineering Services with respect to Real or Tangible Personal Property. Architectural and engineering services with respect to real or tangible personal property are professional services within the meaning of this section, 4.d.

However, unlike in the case of the general rule that applies to professional services, (1) the sale of such an architectural service is assigned to a state or states if and to the extent that the services are with respect to real estate improvements located, or expected to be located, in such state or states; and

(2) the sale of such an engineering service is assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in such state or states, including real estate improvements located in, or expected to be located in, such state or states. These rules apply whether or not the customer is an individual or business customer. In any instance in which architectural or engineering services are not described in this section 4.d.iii(B), the sale of such services shall be assigned under the general rule for professional services. See 4.d.iii(A).

(C) Services provided by a Financial Institution. The apportionment rules that apply to financial institutions are set forth at [Financial institutions special apportionment regulation or statute]. That [statute] includes specific rules to determine a financial institution's sales factor. However, [the statute] also provides that receipts from sales, other than sales of tangible personal property, including service transactions, that are not otherwise apportioned under [the financial institutions statute], are to be assigned pursuant to [UDITPA]. In any instance in which a financial institution performs services that are to be assigned pursuant to [UDITPA], including, for example, financial custodial services, those services shall be considered professional services within the meaning of this section, 4.d, and shall be assigned according to the general rule for professional service transactions as set forth at 4.d.ii(A).

Comment [A7]: Note that this provision is specific to language contained in the MTC financial institutions statute. However, not all states have adopted the statute, and those that have may not incorporate or apply it in its original form.

(D) Mutual Fund Sales. Mutual fund sales within the meaning of this regulation, 830 CMR 63.38.1, generally are sales of professional services for purposes of 830 CMR 63.38.1(9)(d)4.d. See 830 CMR 63.38.1(2) (definition of mutual fund sales). However, the rules to assign mutual fund sales made by a mutual fund service corporation are those set forth in 830 CMR 63.38.7, and not those set forth in this regulation, 830 CMR 63.38.1. Also, in the case of mutual fund sales made by a taxpayer that is not a mutual fund service corporation, such mutual fund sales shall be assigned by applying the sourcing methodology described in 830 CMR 63.38.7(4)(c)4 to such sales. In these cases, consistent with the rules of M.G.L. c. 63, § 38(f) and 830 CMR 63.38.7, the mutual fund sales made by the taxpayer directly or indirectly to the RIC are included in the numerator and denominator of the taxpayer's sales factor irrespective as to whether the taxpayer is taxable in one or more of the states in which the RIC's shareholders are domiciled.

(E) Inter-company Sales. With regard to professional services provided to a related party, it shall be presumed that the services are delivered to the jurisdictions in which the related party does business.

iii. Examples.